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IN THE

Supreme Court of the United States

October Term, 1958.

No. 247

LEON ROSENFIELD, as Administrator d.b.n.c.t.a. of Estate of George D. Beaston, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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JURISDICTION.

The judgment of the Court of Appeals sought to be reviewed was entered on May 12, 1958. This petition is presented within ninety days from the date of entry of the judgment of the Court below.

The jurisdiction of this Court is invoked under section 1254(1) of the judicial code, 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Did the taxpayer make a binding election to have an estate taxed under the optional valuation provision of section 811(j) of the Internal Revenue Code of 1939 where the return was made up under a complete misunderstanding of the procedure involved with respect to the valuation of assets?

2. Has the taxpayer actually made a valid and binding election to use the optional valuation date under section 811 (j) of the Internal Revenue Code of 1939 where he failed to comply with the requirements for doing so as set forth in the applicable regulations?

3. Has the taxpayer made a valid and binding election when he answers "yes" to a question as to whether he chooses to value the property of the estate as of one year after death, if the return on its face is clearly inconsistent with the answer?

STATUTES AND REGULATIONS INVOLVED.

INTERNAL REVENUE CODE OF 1939.

SEC. 811. GROSS ESTATE

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(j) Optional Valuation. If the executor so elects upon his return (if filed within the time prescribed by the Commissioner in pursuance of law), the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death . . . (26 U. S. C., Sec. 811.)

TREASURY REGULATIONS 105, PROMULGATED UNDER THE INTERNAL REVENUE CODE OF 1939.

Section 81.11 Optional Valuation date.—In general, the object of subsection (j) of section 811 is to make provision whereby the amount of tax otherwise payable may be lessened when, within the year following the decedent's death, the gross estate has suffered a shrinkage in its aggregate value.

The executor may, by an election upon his return, Form 706, if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law, have the property which was included in the gross estate on the date of the decedent's death valued as of the applicable dates as follows:

* * *

(b) Any property not distributed, sold, exchanged, or otherwise disposed of within such 1-year period, valued as of the date one year after the date of decedent's death;

* * *

The election of the executor to have the gross estate valued in accordance with the method authorized by section 811 (j), in order to be effective, must be made on the return filed within 15 months from the decedent's death or within the period of any extension of time granted under the provisions of section 81.69 or 81.70 of these regulations. Unless the executor makes such election, all property included in the gross estate must be valued as of the date of the de-

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958

No.

LEON ROSENFIELD, AS ADMINISTRATOR D.B.N.C.T.A. OF ESTATE OF GEORGE D. BEASTON, DECEASED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner prays that a Writ of Certiorari be issued to review the final judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The opinion of the District Court is reported at 156 F. Supp. 780 (1957) and appears in the appendix to this petition. The opinion of the Court of Appeals for the Third Circuit is not yet reported and is also appended hereto.

cedent's death. In no case may the election be exercised, or a previous election changed, after the expiration of the time for the filing of the return. The election applies to all the property included in the gross estate on the date of the decedent's death. It cannot be applied only to a portion of such property.

STATEMENT OF THE CASE.

The petitioner in this case sought a refund of additional estate taxes assessed against the estate of George D. Beaston, who died July 25, 1950. Harry T. Beaston was the executor of the estate. The latter died, and the present petitioner, Leon Rosenfield, was named administrator of the estate.

The estate tax return in this case was prepared at a time when the regular attorney for the estate, John Patrick Walsh, was ill at home because of a heart ailment. Walsh's office associate, I. Irving Tubis, Esquire, was given the task by Mr. Walsh of preparing the return with instructions to value the assets of the estate as of the date of death and also as of one year from that date. He was told to elect the optional valuation under section 811(j), if the value one year after death was lower (R. 4a-5a).

Mr. Tubis was not familiar with estate tax returns, never having made one out, and he misunderstood Mr. Walsh's instructions. Tubis testified that he thought the regulations permitted him to use the optional valuation of one year after death with regard to any given asset of the estate if such asset was lower in value at that time than at the time of death. Mr. Tubis did not realize that all the assets of the estate had to be consistently valued both as of the time of death and one year after death and the election based on the lower total value. Therefore, he computed the value of all the assets as of the date of death, and as of one year after death. He inserted the value as of the date of

death in the "Value at date of death" column of the return. If the value of the asset was lower as of one year after death, he inserted that lower value in the "Value under option" column of the return. However, if the value as of one year after death was higher he inserted the value as of the date of death in the optional value column, as well as in the date of death column (R. 5a-9a). Based on such mistaken procedure, the valuation listed in the "Value under option" column was necessarily lower than the date of death value.

Since the "Value under option" column was lower in amount he answered "yes" to the question on the return which asked:

> "Does the executor elect to have the gross estate of this decedent valued in accordance with values as of a date or dates subsequent to the decedent's death as authorized by section 811(j) of the Internal Revenue Code?"

Mr. Tubis then computed the tax based on this misconception.

Mr. Tubis testified that he answered the question "yes" because he was under the impression that the estate could be valued as outlined above and because his computation showed the optional valuation, as so calculated, to be lower than the date of death valuation. He stated that he would have answered "no" if the optional valuation had been higher (R. 8a-10a).

The executor filed the return as prepared by Mr. Tubis.

The Internal Revenue Service treated the return as one based on the optional valuation. The estate assets were revalued so as to correctly reflect the true one year after death values. This resulted in an increase of value of approximately $46,000.00. Petitioner paid the resulting deficiency and sued for a refund.

The District Court recognized that the representatives of petitioner had been mistaken with respect to the correct

procedure in computing the tax under the optional valuation. However, the Court considered itself bound by a previous opinion of the Court of Appeals for the Third Circuit although it acknowledged that other circuits would have permitted the refund (Appendix, p. 18).

The Court below affirmed on the basis of the opinion of the District Court.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

1. The Decision of the Court Below Is in Direct Conflict With Those of the Second and Fifth Circuits.

This case is not one where a taxpayer seeks to make an election after the period provided by statute has expired. It is the position of the petitioner *that an effective election was never made in this case because the taxpayer acted under a mistake with respect to the procedure involved in making up the valuation portions of the estate tax return.* When the taxpayer answered "yes" he merely intended to confirm what he had done, namely, to take the lower of the two values of each asset includible in the decedent's estate. The terms of the regulations which called for valuation of the estate as a whole on the date of death, and which permitted an optional valuation one year thereafter, were not followed. Certainly the taxpayer's intention was to minimize the tax, not to give the government a windfall. Yet the effect of the decision of the Court below has been to hold petitioner to an election not knowingly made.

The Circuit Court merely affirmed the action of the District Court and adopted the latter's opinion which held that an election had been made and could not be revoked. The District Court in its opinion recognized that a conflict existed among the circuits stating:

> "Therefore, at least in the Third Circuit, the law would appear to be that when, in the comparable field of income tax, an election has been made, it cannot be revoked to secure tax advantages after the time for filing the tax return has passed." (Appendix, p. 18.)

The District Court acknowledged that the two cases relied on by petitioner were in conflict with the views expressed by the Court of Appeals for the Third Circuit in *Lamb v. Smith*, 183 F. (2d) 938 (C. A. 3, 1950) and followed by the District Court in the present case, albeit reluctantly.

In *Meyer's Estate v. Commissioner*, 200 F. (2d) 592 (C. A. 5, 1952) the stockholders, during the liquidation of a corporation, elected to treat the gain under section 112(b)(7) of the Internal Revenue Code rather than under section 115(c). This election was based on an accountant's report indicating a small earned surplus. As a matter of fact there was a large earned surplus for tax purposes which had not been brought to the attention of the stockholders when the election was made.

The stockholders attempted to rescind the election because of the initial misunderstanding with respect to the size of the earned surplus. The Court permitted them to do so pointing out that this was not a situation where the taxpayers sought to extend the statutory time for an election but to abandon one already made. The Court held it would be inequitable under the circumstances not to permit the rescission.

Similarly, in *Richardson v. Commissioner*, 126 F. (2d) 562 (C. C. A. 2, 1942) the taxpayer attempted to make a gift of certain stock prior to the inception of the gift tax in 1932, but he failed to perfect the gift until after the tax was adopted. Thinking that he had made a valid gift prior to the imposition of the gift tax, he did not claim the specific statutory exemption of $50,000.00 for the year 1932. He used it, however, on the occasion of other gifts in 1934.

The Board of Tax Appeals held that he had not perfected the gift prior to the inception of the gift tax in 1932,

although he completed it later that year. Nevertheless, the Board permitted him to shift the exemption back from 1934 to 1932 despite his election to use it in 1934. This, of course, reduced interest charges on the deficiency, which was shifted from 1932 to 1934. The Commissioner took the position that, once made, the election was binding on the taxpayer.

The Second Circuit Court of Appeals in sustaining the Board of Tax Appeals said:

> "If the taxpayer had claimed the $50,000.00 exemption in 1934 in ignorance of the facts which created liability for a 1932 gift tax, he would be permitted, upon discovery of the material facts, to recompute his 1932 and 1934 returns so as to claim his exemption in the earlier year . . . . *We see no reason why ignorance of the law is not equally a bar to an intelligent 'election', and why the taxpayer should be held to a choice made under a misapprehension of this legal liability.*" (569) (Emphasis supplied.)

It is submitted that the present case involves precisely the same situations that were presented in the aforementioned cases and that on the basis of those cases the court below should have held that the taxpayer did not make a valid election. In both of these cases the taxpayer acted under a bona fide mistake. The petitioner in the present case too acted under a mistake as to the allowable method of filling out his estate tax return. He thought he was minimizing the taxes when in fact his erroneous computation had the opposite effect. The purported election was made only because he thought that the law allowed him to value the estate in the manner set forth above. To say that the taxpayer here made a real choice or election, when it was done without any real knowledge or understanding of the requirements, is inequitable and clearly contrary to the decisions of the *Richardson* and *Meyer's* cases.

It should be pointed out that the facts in this case and the *Meyer's* and *Richardson* cases must be distinguished from the line of cases in which the taxpayer seeks to shift from one position to another over a period of several years. In such cases several different tax returns are often involved. Such attempted shifting usually seeks to avoid the consequences of an election made with full knowledge or full awareness of the risk of possible changes in the facts or in the law over a period of time. *Lamb v. Smith*, 183 F. (2d) 938 (C. A. 3, 1950); *Pacific National Co. v. Welsh*, 304 U. S. 191 (1938).[1]

2. The Court Below Has Based Its Decision on an Erroneous Interpretation of the Applicable Regulations.

The action of the Court below in upholding the decision of the lower Court has created a situation in which petitioner is forced into an election which was not made in compliance with regulations and is inequitable in its result.

Treasury Regulations 105, Section 81.11, which implements Section 811(j), provides in pertinent part:

> "Unless the executor makes such election, all property included in the gross estate must be valued as of the date of the decedent's death . . . . *The election applies to all the property included in the gross estate on the date of the decedent's death. It cannot be applied only to a portion of such property.*" (Emphasis supplied.)

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1. In the *Pacific National* case *supra* and *Riley Co. v. Commissioner*, 311 U. S. 55 (1940), the decisions of the Court were based not only on the view that elections not touched by mistake in fact or law once actually made were binding, but also on the practical problem of administrative finality in the continuing administration of the income tax where a choice once made with respect to the method of returning sales of real property or computing the depletion allowance in a mining operation continues to affect returns for an indefinite number of years in the future. Cf. *Meyer's Estate v. Commissioner*, *supra*, at p. 595.

No such problem of administrative necessity presents itself with respect to the estate tax where only one return is ever filed. Moreover, the problem here is whether an election was actually made.

Despite the foregoing the petitioner did, in fact, attempt to apply the election to only a portion of the property. He failed to follow the regulations, and yet respondent treats his action as an election from which he cannot escape the consequences. The law is well established that unless an election is made in accordance with the regulations it is ineffective. *Flinchbaugh Estate*, 1 T. C. 653 (1943).

Petitioner seeks here to be relieved from the consequences of his action in purporting to make an election in a manner not in compliance with the requirements of the applicable regulations. It is submitted therefore that the estate should be valued as of the date of death without regard to the abortive election.

The mere fact that the taxpayer answered "yes" to the question is not to be equated with the actual making of the election. The answer "yes" was the result of the erroneous computation of "optional value" in the return as indicated by the testimony of Mr. Tubis (R. 10a). The intention to elect must be ascertained from the return as a whole. Clearly there was no intention to make an election in the instant case. The result of the insistence of the Court below that an election was made is to unjustly enrich the respondent.

The optional valuation provision was enacted by Congress to mitigate hardships on taxpayers resulting from shrinkage in value of assets during the year following death. *Maass v. Higgins*, 312 U. S. 443 (1941). It is ironic that a remedial statute such as this should be employed as a trap for a taxpayer who is ignorant of the manner in which the estate tax return should be made out.

In the instant case, the record shows (R. 14a) that the Internal Revenue Service took the position in conferences with the taxpayer that the option had not been exercised in accordance with the regulations, yet proceeded to assess the tax as though it had been properly exercised. Concededly, there would be merit in the Government's posi-

tion if this were a case in which the taxpayer was attempting to seize upon a minimal error as an excuse for denying his exercise of the election, after discovery that date-of-death valuation would have produced a lower tax. However, this is clearly not such a case; for here the error was so gross and consistent as to constitute a complete non-compliance with the regulations, and so artless as to be readily identifiable as bona fide.

CONCLUSION.

WHEREFORE, it is submitted that this Court should grant a Writ of Certiorari to the Court of Appeals for the Third Circuit, and that the judgment of the Court below be reversed.

Respectfully submitted,

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APPENDIX.

Opinion of U. S. District Court Sur Pleadings and Proof.

GRIM, *J.* December 3, 1957.

The government has assessed additional estate tax against the plaintiff, which has been paid. In this action plaintiff is attempting to recover the amount of the additional estate tax assessed against it.

The decedent died on July 25, 1950. During the year after death some securities owned by the estate increased in value. Others decreased in value and others did not change. The aggregate amount of the increases during that period exceeded the amount of the decreases by some $40,000.

In determining values for estate tax purposes the Internal Revenue Code grants estates an option to have their assets valued as of the date one year after death if they so elect.[1] This is termed the optional valuation date. The option can be exercised only if certain conditions are met; if the tax return is filed on time (within 15 months after death) and if the estate elects on the return to have the assets valued as of the optional valuation date. Once properly made, the election cannot be revoked after the expiration of the time for filing the return. When the election is made, all the assets of the estate must be valued as of the optional valuation date. Estates are not given the option to pick and choose one date or the other (date of death or one year after death) for each asset individually.[2]

1. ". . . . The purpose of [this] was to mitigate the hardship consequent upon shrinkage in the value of estates during the year following death. Congress enacted it in the light of the fact that, due to such shrinkages, many estates were almost obliterated by the necessity of paying a tax on the value of the assets at the date of decedent's death." *Maass v. Higgins*, 312 U. S. 443, 446 (1941).

2. The revenue Code, 26 U. S. C. A. (I. A. C. 1939), Sec. 811(j) provides: "(j) Optional Valuation. If the executor so elects

In this case the estate tax return was filed on August 27, 1951, well within 15 months after death. The return form included this question:

> "Does the executor elect to have the gross estate of this decedent valued in accordance with values as of a date or dates[3] subsequent to the decedent's death as authorized by section 811(j) of the Internal Revenue Code? .....
> (Answer 'Yes' or 'No')"

The question was answered yes on the return. Since the aggregate value of the assets of the estate increased in value during the year after death, from an estate tax point of view the proper answer to the question should have been no instead of yes. It is because of the mistake in answering the question yes instead of no that the additional estate tax was assessed against plaintiff estate and paid. This suit has been brought to relieve the estate from the consequences of the mistake and to recover the additional estate tax which it has paid.

The executor[4] of the estate relied completely upon the attorney for the estate to prepare the return, including the answer to the question as to the optional valuation date, and to compute the tax. Relying upon the attorney's implied

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upon his return (if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law), the value of the gross estate shall be determined by valuing all the property included therein on the date of decedent's death as of the date one year after the decedent's death . . ." Treasury Regulation 105, Section 81.11 (1) provides: "The election of the executor to have the gross estate valued in accordance with the method authorized by Section 811(j), in order to be effective, must be made on the return filed within 15 months from the decedent's death or within the period of any extension of time granted . . . In no case may the election be exercised, or a previous election changed, after the expiration of the time for the filing of the return."

3. When the optional date is selected, all assets disposed of within a year after death must be valued as of the date of disposal.

4. The executor has died and has been succeeded by an administrator d.b.n.c.t.a.

advice, he signed the return as the attorney prepared it and submitted it to him.

The attorney has testified in the present case. His testimony discloses that yes was the answer intended to be given to the quoted question. It shows that he mistakenly believed that by electing the optional valuation date the estate would be permitted to pick and choose the advantageous date for each individual asset. Accordingly, under the column headed "Value under option" on the return he entered the valuation at the date of death for each asset which had increased in value within a year after death, and the year after death valuation for each asset whose value had decreased or remained unchanged during that period. He then proceeded to make a computation of the tax, treating the total of this hodgepodge of values as the correct total optional valuation. These actions are consistent with and clearly confirm the attorney's testimony of the estate's intention to elect the optional valuation date, its misunderstanding of the method of computing the tax based upon an optional valuation, and hence its misunderstanding of the tax consequences of exercising the election.

It is clear that if the estate had made no election, date of death values would have had to be used. Plaintiff contends that since it applied the election to only a portion of the assets of the estate (the favorable portion), its action, being contrary to the statute and the regulations, was not a true election and that therefore the date of death values must be used. Plaintiff's contention restated is that since the regulations (Sec. 81.11 of Regulation 105) provide that "The election applies to all the property in the gross estate on the date of decedent's death. It cannot be applied to a portion of such property," an attempted application of the election to only a portion of the property in the estate in violation of the regulations does not constitute a valid or true election and that consequently the case must be treated as though no election had been made. With this contention I cannot agree.

The fact that the estate misunderstood the effect of the election on its tax liability and prepared the return in accordance with this misunderstanding does not mean that it did not make an election. In the course of settling decedents' estates many decisions must be made. The fact that a decision later turns out to have been unwise does not mean that no real decision was made. And it is still a true decision even though it may have been based upon an improper method of computing tax liability or upon a mistake of law or fact and leads to an increase in tax liability. In the present case the decision of the estate upon the advice of counsel to elect the optional valuation was an unwise decision, but certainly it was a real decision and the election of the optional valuation date was a real election.

Conceivably there may be cases where an estate tax return has been prepared in such a way as to show a mistake of a type from which the estate could be relieved by court action. For instance, in the present case where the question was answered yes, if all the information as to values of securities had been entered on the return on the basis of values at the time of death and the tax had been computed clearly on date of death values, then the yes answer to the question would have been inconsistent with the rest of the return and inconsistent with the theory on which the tax was computed. In such a case the tax return would show an obvious ambiguity as to whether or not the election had been exercised and it might be proper to receive oral testimony to show what answer really was intended and that the yes answer was a mistake such as a slip of the pen or a stenographer's error. In such a case despite the yes answer the estate might be relieved from liability for tax on an unintended year after death valuation basis. This would be the result because neither the statute nor the regulations necessarily require the use of a specific question as to the optional valuation on the return. They merely state that the election must be made on the return without speci-

fying precisely what act shall constitute an election.[5] A tax return like any other document should be read as a whole to determine its true meaning, and when it appears from the return that the yes answer may not have been intended, the estate should be able to resolve an ambiguity and to show that it actually intended to say.[6]

In the present case, however, there is no ambiguity and no uncertainty on the return. The answer to the election question is yes. The information is given in conformity with a yes answer and the tax is computed on the basis of a yes answer, albeit on the basis of the wrong results of a yes answer. The testimony also shows that the estate intended to answer yes to the question.

Plaintiff contends also that even though the estate elected the optional valuation date it should now be permitted to revoke the election because it was made by mistake. He cites *Meyer's Estate v. Commissioner*, 200 F. 2d 592 (5th Cir. 1952) and *Richardson v. Commissioner*, 126 F. 2d 562 (2d Cir. 1942) as cases in which taxpayers have been permitted to revoke elections because they were made under mistake of fact or of law. There are other tax cases, however, which deny the right to revoke an election after the time for filing of a return has passed. See *Pacific National Co. v. Welch*, 304 U. S. 191 (1938), *Rose v. Grant*, 39 F. 2d 340 (5th Cir. 1930). *Rose v. Grant* has been followed in this circuit in *Lamb v. Smith*, 183 F. 2d 938, 943

5. The current tax return form dated May, 1955, has been changed somewhat from the older form. It now presents the problem to the taxpayer thus: "An election to have the gross estate of the decedent valued as of the alternate date or dates is made by entering a check mark in the box set forth below.

[ ] The executor elects to have the gross estate . . . valued . . . as of a date or dates subsequent to the decedent's death . . ."

6. Since the statute requires that an election to be effective must be made on the return, this reasoning as to resolving an ambiguity on a return probably would not apply to the converse of the situation in the present case, namely, an attempt by oral testimony to show that the optional valuation was elected even though the return did not clearly show it.

(1950), in which a husband and wife filed a joint income tax return. After the time for filing the return had passed, they discovered that a family partnership they had set up was going to be recognized for tax purposes and they then attempted for their tax advantage to file separate tax returns in place of the previous joint return. The Court of Appeals for this circuit refused to permit them to revoke their first election. Therefore, at least in the Third Circuit, the law would appear to be that when, in the comparable field of income tax, an election has been made, it cannot be revoked to secure tax advantages after the time for filing the tax return has passed. See also Mertens Law of Federal Income Taxation, 1948 Revision, Sees. 60.17, 60.18.

The option to elect a subsequent valuation date for estate tax purposes is a right which Congress has given to decedents' estates as a matter of grace. If by mistake the election is not properly made within the permitted time, hardship and equities will not be considered in determining whether an election can be permitted after the time has expired. See *Riley Co. v. Commissioner*, 311 U. S. 55 (1940), *Kehoe-Berge Coal Co. v. Commissioner*, 117 F. 2d 439 (3d Cir. 1941). The *Riley* and *Kehoe-Berge* case involved income tax rather than estate tax. The present case differs from them also in that here the taxpayer instead of trying because of a mistake to enforce its right to make a late election, is trying beyond the permitted time to revoke an election which it made within that time because it was mistaken about the results of the election. The statute itself does not provide as clearly as it might that an election to use the optional valuation cannot be revoked after the time for making the election has passed, but it indicates that this is what is intended, by saying that if the election has been made "the value of the gross estate *shall* be determined by valuing *all* the property as of the date one year after the decedent's death." (emphasis supplied). The Regulations properly and appropriately state, "In no case may the election be . . . changed after the expiration of the time for filing

of the return." In view of the clear language of the regulation, is seems to me that as far as the equities are concerned, the taxpayer must be held to the same liability for having exercised an election by mistake as he would be held to if he were attempting to make a late election after he had failed by mistake to make it within the proper time.[7] The language of the Supreme Court in *Riley Co. v. Commissioner*, *supra* (p. 59), followed by the Third Circuit in the *Kehoe-Berge* case, *supra*, is applicable to this case: "Petitioner urges that this result will produce a hardship here. It stresses the fact that it had no actual knowledge of the new opportunity afforded it . . . and that equitable considerations should therefore govern. That may be the basis for an appeal to Congress in amelioration of the strictness of that section. But it is no ground for relief by the courts from the rigors of the statutory choice which Congress has provided."

While the purpose of the law permitting an optional valuation was to benefit taxpayers and not to trap the unwary into paying higher estate taxes, it is my opinion that in the present case the estate must be held to the election which it has made.

Judgment will be entered in favor of the defendant. This opinion will constitute the findings of fact and conclusions of law in the case.

/s/ Allan K. Grim,
J.

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7. It is not for the courts to question or confirm the wisdom of a proper regulation, but it would appear to be wise to fix a time beyond which an election cannot be changed.

OPINION OF THE U. S. COURT OF APPEALS FOR THE THIRD CIRCUIT.

(Filed May 12, 1958)

PER CURIAM.

The Internal Revenue Code of 1939 permits the representative of an estate the election of evaluating the assets in the gross estate either as of the date of death or one year after death. 26 U.S.C. § 811 (1952 ed.). Section 81.11 of Treasury Regulation 105 provides that "In no case may the election be exercised, or a previous election changed, after the expiration of the time for the filing of the return."

The administrator d.b.n.c.t.a. in this case seeks a refund of additional estate tax assessed by the Commissioner. The additional tax was the result of the original executor's apparent election manifested on the estate's return to have the assets valued one year from date of death. It is the administrator's argument here that the apparent election was not binding and irrevocable because it was made upon a mistake as to the consequences of that election.

The district court entered judgment for defendant, relying on Section 81.11 of Treasury Regulation 105 and analogous tax cases denying the right to change the election after date for filing has passed. 156 F. Supp. 780 (E.D. Pa. 1957). The election here was made upon a full disclosure of facts. It is therefore binding, and we can add nothing to the opinion of the district court.

The judgment of the district court will be affirmed.

FILE COPY

No. 247

Office-Supreme Court, U.S.
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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958

LEON ROSENFIELD, as Administrator d.b.n.c.t.a. of Estate of GEORGE D. BEASTON, Deceased, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 247

LEON ROSENFIELD, as Administrator d.b.n.c.t.a. of Estate of GEORGE D. BEASTON, Deceased, PETITIONER,

v.

UNITED STATES OF AMERICA

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OPINIONS BELOW

The opinion of the District Court (Pet. 13-19; R. 15-21) is reported at 156 F. Supp. 780. The opinion of the Court of Appeals (Pet. 20; R. 24) is reported at 254 F. 2d 940.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1958. (R. 26.) The petition for a writ of certiorari was filed on August 2, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the petitioner is bound by the election made by the executor on the return to have the value of the assets in the gross estate determined under the optional valuation provisions of Section 811(j) of the Internal Revenue Code of 1939.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States——

* * * * *

(j) *Optional Valuation.*—If the executor so elects upon his return (if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law), the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death, except that (1) property included in the gross estate on the date of death and, within one year after the decedent's death, distributed by the executor (or, in the case of property included in the gross estate under subsection (e), (d), or (f) of this section, distributed by the trustee under the instrument of transfer), or sold, exchanged, or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange, or other disposition, whichever first occurs, instead of its value as of the date one

year after the decedent's death, and (2) any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 811 (j).)

Treasury Regulations 105, promulgated under the Internal Revenue Code of 1939:

Sec. 81.11 *Optional valuation date.*—In general, the object of subsection (j) of section 811 is to make provision whereby the amount of tax otherwise payable may be lessened when, within the year following the decedent's death, the gross estate has suffered a shrinkage in its aggregate value.

The executor may, by an election upon his return, Form 706, if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law, have the property which was included in the gross estate on the date of the decedent's death valued as of the applicable dates, as follows:

* * * * *

(b) Any property not distributed, sold, exchanged, or otherwise disposed of within such 1-year period, valued as of the date one year after the date of decedent's death;

* * * * *

The election of the executor to have the gross estate valued in accordance with the method authorized by

section 811(j), in order to be effective, must be made on the return filed within 15 months from the decedent's death or within the period of any extension of time granted under the provisions of section 81.69 or 81.70 of these regulations. Unless the executor makes such election, all property included in the gross estate must be valued as of the date of the decedent's death. In no case may the election be exercised, or a previous election changed, after the expiration of the time for the filing of the return. The election applies to all the property included in the gross estate on the date of the decedent's death. It cannot be applied only to a portion of such property.

In every case where the election is exercised, the return, Form 706, must set forth (1) an itemized description of all property included in the gross estate on the date of the decedent's death, together with the value of each item as of that date, (2) an itemized disclosure of all distributions, sales, exchanges, and other dispositions of any of the property during the 1-year period after the decedent's death, together with the dates thereof, and (3) the value of each item of property determined in accordance with the provisions of subsection (j). * * *

STATEMENT

The pertinent facts, as shown by the stipulation of facts (R. 2-3) and as found by the District Court (Pet. 13-15; R. 15-17), are as follows:

George D. Beaston died testate on July 25, 1950. During the year after his death, some of the securities held by his estate increased in value, others decreased, and the remaining ones did not change in value. The aggregate amount of the increases during that period

exceeded the amount of the decreases by some $40,000. (Pet. 13; R. 2, 15.)

On August 27, 1951, the executor for the estate filed an estate tax return which had been prepared by the attorney for the estate (Pet. 13-15; R. 15-17.) On the form on which such return was made, the following question was asked (Pet. 14; R. 16):

> Does the executor elect to have the gross estate of this decedent valued in accordance with values as of a date or dates [1] subsequent to the decedent's death as authorized by section 811(j) of the Internal Revenue Code? * * *

That question was answered "Yes" on the return. In testifying in regard to this, the attorney for the estate stated that "Yes" was the answer intended to be given to the question. But he indicated that he had mistakenly believed that by electing the optional valuation date the estate could choose whichever date was more advantageous for each individual asset. Thus, under the column on the return headed "Value under option", he entered the value at the date of death for the assets which had increased in value during the year after death, and the value at the end of the year for those which had decreased or remained unchanged, and used the total of this hodgepodge of values as the optional valuation for the estate. As the Commissioner did not approve this method of determining the optional valuation, he assessed a deficiency in estate tax. (Pet. 14-15; R. 2, 16-17.)

After the payment of that deficiency, and rejection of a claim for refund (except for a minimum portion of

[1] When the optional date is selected, all assets disposed of within a year after death must be valued as of the date of disposal.

the tax relating to an issue not involved here), the administrator d.b.n.c.t.a., who had succeeded the deceased executor, filed this suit to recover the balance of the deficiency. The District Court sustained the Commissioner's determination, and entered judgment for the United States. (R. 21-22.) The judgment of the District Court was affirmed by the Court of Appeals. (R. 26.)

ARGUMENT

The court below was correct in holding that the executor made a binding election to have the assets in the gross estate valued as of the date one year after the decedent's death.

Section 811(j) of the Internal Revenue Code of 1939, *supra*, allows an optional valuation date as an elective alternative to the valuation of the assets at the date of death. The requirements it sets forth are (1) that the executor shall make an election upon the estate tax return, and (2) that he must file such return within tl prescribed time. If those requirements are met, Section 811(j) provides that "the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death."

Section 81.11 of Treasury Regulations 105, *supra*, issued pursuant to Section 811(j), reiterates the statutory requirements and provides that "In no case may the election be exercised, or a previous election changed, after the expiration of the time for the filing of the return." Section 81.11 also provides that in every case where the election is exercised, the return, Form 706, must set forth an itemized description of all property included in the gross estate on the date of the decedent's

death and "the value of each item of property determined in accordance with the provisions of subsection (j)."

Petitioner has accepted this regulation as a proper interpretation of the statute, as have the courts below. Moreover, petitioner does not object to the form on which the estate tax return was filed, and which asked the question whether the executor was electing to have the gross estate of the decedent valued in accordance with a value as of a date subsequent to the decedent's death as authorized by Code Section 811(j). It is admitted that this question was answered "Yes" on the return, and that such return was filed within the time prescribed by law. Thus, the statutory requirements for election were met and under the applicable regulation, which petitioner has not questioned, the election may not be changed or abandoned now since the time for filing the return expired long before the refund claim was filed.

There is no ambiguity or uncertainty on the return. Not only did the answer to the above question on the form specifically indicate that an election to use the optional valuation was being made by the executor, but this was also shown by the entry of the values for each asset in the column on the return headed "Value under option" as well as in the column headed value at the date of death. As the District Court found (Pet. 15; R. 17), such entries are not only consistent with, but also confirm, the testimony of the executor's attorney that the estate intended to elect the optional valuation date. Furthermore, the attorney's explanation that he had never prepared an estate tax return before and did not know how to correctly compute the optional

valuation does not affect the election which was made or prevent it from being binding. It may have been unwise to make such an election but, if so, that is not a ground for relief by the courts.

Consequently, petitioner is in error in contending that, since the attorney acted under a mistake as to the manner of computing the optional valuation of some of the assets, no effective election was made. *Meyer's Estate* v. *Commissioner*, 200 F. 2d 592 (C.A. 5th), on which he relies, is distinguishable. In that case, the taxpayer-stockholders elected to report gain from a corporate liquidation as taxable under 1939 Code Section 112(b)(7) rather than under the usual procedure of Code Section 115(c). According to the stipulation of facts, that election was made because the taxpayers believed the earned corporate surplus was small but subsequently they found that the surplus was quite large. In view of this mistake of fact, the court allowed the taxpayers to change their election. In the instant case, however, there is no comparable situation for there was a full and correct disclosure of the facts.

In *Richardson* v. *Commissioner*, 126 F. 2d 562 (C.A. 2d), on which petitioner also relies, the taxpayer reported gifts in 1932 but indicated on his return that they had been made prior to the effective date of the gift tax provisions of the Revenue Act of 1932. Thus, he did not claim the statutory exemption of $50,000 in reporting gifts for that year but claimed the exemption for gifts made in 1934. However, as the court held that the 1932 gifts were not perfected until after the effective date for the gift tax and were subject to tax, the taxpayer there was allowed to change his position and use the statutory exemption in computing the tax on the 1932 gifts. Obviously, the circumstances as well

as the statutory provisions under which that case arose are different from those here. But if there is an inconsistency, we submit that the *Richardson* case is contrary to the weight of authority.

The rule denying to a taxpayer the right to repudiate his original exercise of an option by election has been applied in a wide variety of situations. See *Scaife Co.* v. *Commissioner*, 314 U.S. 459 (holding that an erroneous valuation of a taxpayer's capital stock on its first return can not be corrected by an amended, untimely, capital stock tax return); *Riley Co.* v. *Commissioner*, 311 U.S. 55 (holding that a taxpayer, which was unaware of the statutory privilege of electing percentage depletion when its first return was filed, could not make such an election on an amended, untimely, return); *Pacific National Co.* v. *Welch*, 304 U.S. 191 (holding that the taxpayer made a binding election when it reported sales on the deferred payment method, and could not change to the installment method after expiration of the time for filing a return); *Hayes* v. *Commissioner*, 161 F. 2d 689 (C.A. 10th) (holding that the election of a widow to file a joint income tax return for herself and deceased husband was binding, although she had no authority to sign his name and later tried to file a separate return); *Boone County Coal Corporation* v. *United States*, 121 F. 2d 988 (C.A. 4th) (holding that, although a corporation treated intangible drilling costs as capital on its original return without making the required statement as to how it elected to treat such costs, it had made a proper election and could not change to another method as it tried to do on an amended return filed out of time); *Binder* v. *Welch*, 107 F. 2d 812 (C.A. 9th) (holding that a husband and wife who elected to file a joint return are bound

by that election, and can not subsequently file separate returns for the year involved). Also see *Lamb* v. *Smith*, 183 F. 2d 938 (C.A. 3d); *Trust Co. of Georgia* v. *Allen*, 164 F. 2d 438 (C.A. 5th), certiorari denied, 333 U.S. 856; *Burke & Herbert Bank & Trust Co.* v. *Commissioner*, 10 T.C. 1007; 10 Mertens Law of Federal Income Taxation (Rev.), Section 60.20.

As the option to elect a subsequent valuation date for estate tax purposes is given by Congress as a matter of grace, it must be exercised within the time prescribed by statute; and having been so exercised, as it was here, it is binding upon a taxpayer and cannot be withdrawn after the statutory time has expired.[2]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER, 1958.

[2] Petitioner asserts (Pet. 9-11) that the election in the instant case did not comply with the requirements of the Regulations to the effect that the option can not be applied only to a portion of the property. However, even if that be so, it does not follow that there was no election at all or that petitioner is entitled to make another one after the expiration of the time permitted by statute.

U. S. GOVERNMENT PRINTING OFFICE 1958 477405 287